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Strippers, Uber Drivers, and Worker Status in South Carolina

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I. INTRODUCTION

A. *Technological Disruption and the Platform Economy*

Technology's disruptions are not limited to the marketplace.[1] Just as innovation can quickly render long-standing industries obsolete,[2] it can

1. For a recent overview of technology's impacts both inside and outside of the marketplace, see DAVID E. NYE, TECHNOLOGY MATTERS: QUESTIONS TO LIVE WITH (2007); *see also* Arthur Cockfield & Jason Pridmore, *A Synthetic Theory of Law and Technology*, 8 MINN. J.L. SCI. & TECH. 475 (2007) (analyzing competing views on technology's social,

likewise render long-standing legal frameworks irrelevant.[3] Indeed, 21st century innovations have already upset many common law doctrines painstakingly developed throughout the 20th century.[4] Moreover, pressing legal issues ranging from copyright to employment law have proven underserved by the available tools at judicial disposal, and judges have unsuccessfully applied outmoded theories to plainly feral problems.[5] Rather than force these innovations into outdated 20th century schema, however, some scholars and judges have recognized the need for innovative jurisprudential solutions.[6]

The traditional employee/independent contractor distinction—strained by recent technological advances—is one such issue, having garnered

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cultural, political, and legal impacts). For an extreme account of technology's impacts known as "technological determinism"—the belief that technology itself shapes social, cultural, and political views, see generally MERRITT ROE SMITH & LEO MARX, DOES TECHNOLOGY DRIVE HISTORY?: THE DILEMMA OF TECHNOLOGICAL DETERMINISM (1994).

2. For background on the process of "creative destruction," see generally J. STANLEY METCALFE, EVOLUTIONARY ECONOMICS AND CREATIVE DESTRUCTION (2002); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1942).

3. *See also* Kevin Maney, *The Law Can't Keep Up With Technology . . . And That's a Very Good Thing*, NEWSWEEK (Oct. 31, 2015, 2:27 PM), http://www.newsweek.com/.2015/11/13/government-gets-slower-tech-gets-faster-389073.html; Vivek Wadhwa, *Law and Ethics Can't Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology; *see generally* Mirit Eyal-Cohen, *Through the Lens of Innovation*, 43 FLA. ST. U. L. REV. 951, 951 (2016) (arguing *inter alia* that "[t]he legal system constantly follows the footsteps of innovation"); David Friedman, *Does Technology Require New Law?*, 25 HARV. J.L. & PUB. POL'Y 71 (2001) (discussing legal responses to technology and identifying at least three ways in which technology affects the law); Neal Katyal, *Disruptive Technologies and the Law*, 102 GEO. L.J. 1685, 1689 (2014) (addressing some examples of technology's legal disruptions and identifying the law's function as "[p]roviding human values in an age where technology causes both profound wonderment and profound disruption").

4. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) ("The test the California courts have developed over the 20th Century [sic] for classifying workers isn't very helpful in addressing this 21st Century [sic] problem."); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) ("The application of the traditional test of employment—a test which evolved under an economic model very different from the new 'sharing economy'—to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context."). Some recent examples include wearable cameras' disruption of individual privacy law, 3D printing's disruption of intellectual property law, and driverless cars' disruption of tort liability. *See passim* Katyal, *supra* note 3.

5. *See* Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997) (describing the application of established trademark law in the fast-developing world of the internet as "like trying to board a moving bus"); *Cotter*, 60 F. Supp. 3d at 1081 (describing the application of established worker status law to the ride-sharing world as being "handed a square peg and asked to choose between two round holes").

6. For the "square peg" imagery, see *Cotter*, 60 F. Supp. 3d at 1081. For scholarly attempts to refine jurisprudence, see *infra* Part II.

numerous proposals for 21st century renovations.[7] Indeed, the growth of the so-called platform economy,[8] an economic sector in which digital platforms like Uber enable or facilitate workers' generation of income, has deeply problematized this traditional distinction.[9] Two recently decided cases have popularized these problems, having received even general news coverage.[10] In *Cotter v. Lyft, Inc.*, a California court struggled with determining Lyft drivers' worker status and lamented the state's "outmoded" worker status tests.[11] Similarly, in *O'Connor v. Uber Technologies, Inc.*, the court struggled with applying a traditional employment test "which [had] evolved under an economic model very different from the new 'sharing economy.'"[12] The difficulty these and other courts have faced in such cases arises from the novel employment relationships presented by the platform economy.[13]

As detailed in Part II of this Note, workers in the platform economy bear unique and highly individualized relationships with the platforms they use.[14] For example, unlike traditional workers, many platform workers control the number of hours they work, the distribution of those hours throughout the week, the geographic area in which they work, and the immediate environment in which they work.[15] Yet, at the same time, many platform economy workers depend exclusively upon a single platform for their livelihoods.[16] These facts alone problematize the application of the

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7. *See infra* Section II.B.

8. Though I use the term "platform economy," this sector has many names: the "gig economy," the "peer economy," the "collaborative economy," the "sharing economy," the "access economy," the "on-demand economy," the "TaskRabbit economy," etc. *See* Gerald F. Davis, *What Might Replace the Modern Corporation? Uberization and the Web Page Enterprise*, 39 SEATTLE U. L. REV. 501, 512 (2016) (identifying various names and ultimately suggesting the term "platform capitalism"); Meaghan Murphy, *Cities as the Original Sharing Platform: Regulation of the New "Sharing" Economy*, 12 J. BUS. & TECH. L. 127, 129 (2016) (identifying some common names of the gig economy).

9. Examples of "platform economy" companies include: Uber, Lyft, Turo, HopSkipDrive, AirBnB, OneFineStay, OpenAirplane, ToolLocker, ParkingPanda, Closet Collective, Postmates, AmazonFlex, TaskRabbit, Dolly, HelloTech, SpareHire, Freelancer, Etsy, Feastly, and Udemy.

10. *See* Elizabeth Weise, *Lyft Settles with California Drivers for $27M*, USA TODAY (May 11, 2016, 7:59 PM), https://www.usatoday.com/story/tech/2016/05/11/lyft-agrees-27-million-settlement/84257158/.

11. *Cotter*, 60 F. Supp. 3d at 1082.

12. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

13. *See infra* Section II.A.

14. *See infra* Part II.

15. *See infra* Section II.B.

16. *See* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 10 (Nat'l Bureau of Econ. Research, Working Paper No. 22843, 2016) (finding that 38% of Uber partners solely work for Uber).

traditional employee/independent contractor worker status distinction.[17] Additionally problematic, however, is the individuality of each worker's relationship with the platform.[18] For example, while some platform workers maintain non-platform employment and only *supplement* their incomes with platform-facilitated work, others mine their entire livelihood from the platform.[19] Traditional employees, on the other hand, have historically maintained employment with a single employer—and only in rare circumstances maintained dual employment with competitors.

In recent years, courts nationwide have struggled over the application of worker status distinctions to platform employment relationships.[20] Their belabored attempts have prompted an abundance of scholarship on the subject, and this scholarship in turn has occasionally directed subsequent courts' analyses.[21] Importantly, scholars have approached the platform economy's employment dilemma in varying ways.[22] Some have called for the creation of a third worker classification, while others support a default assumption in favor of either employee or independent contractor.[23] Still others simply suggest a recalibration of the traditional distinction.[24]

B. Strippers, Uber Drivers, and Worker Status in South Carolina

One of the largest shortcomings of scholarship on the platform economy's legal disruptions is its exclusively nationwide focus.[25] Indeed, I have found no assessment to date probing the readiness or amenability of an individual jurisdiction for the current disruptions. Thus, most scholarship overlooks the "legal baggage" carried by individual jurisdictions facing platform economy issues.[26]

Though no South Carolina court has yet wrestled with a platform employment case, they have addressed highly analogous issues involving workers using a somewhat different platform. Indeed, as this Note shows in

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17. *See infra* Part II.
18. *See infra* Part II.
19. *See infra* Part II.
20. *See, e.g.*, Search v. Uber Techs., Inc., 128 F. Supp. 3d 222 (D.D.C. 2015); McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017).
21. *See, e.g.*, Reply Brief for Petitioner at 9, BeavEx, Inc. v. Costello, 810 F.3d 1045 (2016) (No. 15-1305), 2017 WL 2438363, at *9.
22. *See infra* Section II.B.
23. *See infra* Section II.B.
24. *See infra* Section II.B.
25. *See infra* Section II.B.
26. *See infra* note 69.

Part IV, South Carolina courts' employment analyses of exotic dancers provide helpful parallels to platform workers.[27]

Importantly, both groups of workers maintain highly unique, independent, and individualized employment relationships with the owners of their respective platforms.[28] Both groups of workers utilize a shared platform to conduct their work and retain control over the amount of hours they work, the distribution of those hours throughout the week, the geographic area in which they work, and the immediate environment in which they work.[29] Moreover, both groups may routinely alternate between competitor platforms.[30] A Friday Uber driver can become a Saturday Lyft driver; a Friday dancer at one club may become a Saturday dancer at another.[31] Additionally, both groups' employment status can fluctuate dramatically within a relatively short period—workers in either group might work throughout June, cease work for July unilaterally and without notice, and then unilaterally opt to resume work throughout August. What's more, workers in both groups receive no set wages from their employer; they obtain income based solely on their quantity and quality of work.

Based on these factual correspondences, courts have unsurprisingly faced similar issues in addressing the employment status of either group of workers.[32] Importantly, this shared irreverancy enables us to anticipate South Carolina courts' analyses of platform employment. Their past assessments of exotic dancers can help reveal their future assessments of platform workers.[33] Troublingly, however, South Carolina courts' recent assessments of exotic dancers' employment status run counter to the most promising models of platform economy employment.[34]

This Note responds to most nationwide scholarship on the subject by examining the jurisprudential readiness of a single jurisdiction—South Carolina—for platform employment. It ultimately argues that in order to

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27. *See infra* Part IV; *see also* Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249 (2017) (noting some similarities between exotic dancers and Uber drivers).

28. Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1539–46 (2016).

29. *See id.*

30. *See generally How to Drive for Uber and Lyft Simultaneously*, RIDE SHARE CONSULTING (July 5, 2017), https://www.rideshareconsulting.com/uncategorized/how-to-drive-for-uder-and-lyft-simulteneously/.

31. *See id.*

32. *See infra* Parts III, IV.

33. *See infra* Part III.

34. *See infra* Section IV.A.

maintain the state's cultivated "business friendly" environment,[35] South Carolina courts should heed recent scholarship's advice on the platform economy and proactively reorient their worker status jurisprudence.

After surveying the problems of platform employment and recent scholarly solutions to them, this Note examines South Carolina's readiness for such issues in a novel way. Drawing from its courts' analyses of exotic dancer employment, this Note explores a South Carolina court's likely handling of an Uber case with facts similar to *O'Connor v. Uber, Technologies, Inc.* Based on this analysis, this Note argues that a South Carolina court would problematically deem all Uber drivers, and likely many other platform workers, employees of the platform. Because this generalizing decision would contradict the most promising scholarly models of platform employment, this Note further argues that South Carolina should reorient its worker status jurisprudence.

II. WORKER STATUS IN THE PLATFORM ECONOMY

The employment classification of platform workers is a thorny and unsettled issue.[36] As the platform economy has grown nationwide, judges and scholars have repeatedly attempted to solve its disruptions to worker status jurisprudence.[37] As noted above, many platform workers control the number of hours they work, the distribution of those hours throughout the week, the geographic area in which they work, and the immediate environment in which they work.[38] Yet, many platform economy workers depend exclusively upon a single platform for their livelihoods.[39] Increasingly, more judges across the country have attempted to resolve specific platform employment issues using their inherited jurisprudence.[40] Additionally, academic articles abound on the subject, with many offering unique—and contradictory—solutions.[41] While some advocate only recalibration of our current worker status distinctions, others call for radical revisions or the creation of entirely new worker categories. Still others

35. See, for example, the South Carolina Department of Commerce's slogan "Just right for your business." S.C. DEP'T OF COMMERCE, https://www.sccommerce.com/ (last visited Feb. 23, 2018).

36. *See infra* Section II.B.

37. *See infra* Sections II.A–B.

38. *See* Means & Seiner, *supra* note 28.

39. *See* Hall & Krueger, *supra* note 16, at 10 (finding that 38% of Uber partners solely work for Uber).

40. *See, e.g.*, Search v. Uber Techs., Inc., 128 F. Supp. 3d 222 (D.D.C. 2015); McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017).

41. *See infra* Section II.B.

simply call for a recalibration of the traditional distinction.[42] This Part surveys both judicial and academic responses to the problem of platform worker status. It then analyzes in detail the most promising approach taken thus far—the Means-Seiner "worker flexibility" approach.[43]

A. Judicial Approaches to Worker Status in the Platform Economy

Unlike many academic approaches to platform economy employment, judicial approaches have primarily been conservative.[44] Restrained by the established employment tests in their respective jurisdictions, judges have simply applied the standard tests with relatively little adornment.[45] Though some judges have noted the insufficiencies of standard tests, they have found little guidance on how to update them.[46] And, as will be shown below, many scholarly proposals are too drastic to offer much assistance to trial court judges confined to prior rulings.[47] Thus, most judicial approaches have been strained applications of plainly inapplicable tests.[48]

B. Scholarly Approaches to Worker Status in the Platform Economy

As indicated above, numerous scholars have proposed solutions to platform economy employment.[49] Though a full review of academic

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42. *See infra* Section II.B.

43. *See infra* Section II.B.

44. *See infra* notes 45–48.

45. *See, e.g.*, Lawson v. Grubhub, Inc., No. 15-CV-05128-JSC, 2017 WL 2951608, at *5–6 (N.D. Cal. 2017) (applying the *Borello* factors); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138–39 (N.D. Cal. 2015) (applying California's "right to control" test); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1076 (N.D. Cal. 2015) (applying the *Borello* factors but noting their insufficiency).

46. *See, e.g.*, *Cotter*, 60 F. Supp. 3d at 1075 (N.D. Cal. 2015) (applying the *Borello* factors but noting their insufficiency); *O'Connor*, 82 F. Supp. 3d at 1138–39 (applying California's "right to control" test).

47. *See infra* Section II.B.

48. *See* Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997) (describing the application of established trademark law in the fast-developing world of the internet as "like trying to board a moving bus"); *Cotter*, 60 F. Supp. 3d at 1081 (describing the application of established worker status law to the ride-sharing world as being "handed a square peg and asked to choose between two round holes").

49. For an overview of some "third category" approaches, see Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017); Yasaman Moazami, *Uber in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going Beyond the Dichotomous Workers' Classification?*, 24 U. MIAMI INT'L & COMP. L. REV. 609 (2017);

approaches to worker status in the platform economy is outside the scope of this Note, many important observations may be made.[50] Generally speaking, recent proposals fall into three categories: (1) "modification approaches," seeking to recalibrate traditional worker status tests; (2) "third category approaches," recognizing a separate category of "dependent contractors" and creating a tripartite worker status schema; and (3) "assumption-shifting approaches," proposing a default assumption of platform workers as employees.[51] To be sure, each category offers conceptually appealing revisions of the worker status doctrine. Both the "third category" and the "assumption shifting" approaches, however, share a critical shortcoming: impracticability.[52] Both require either direct legislative intervention in the worker status doctrine or radical judicial alteration of it. Courts may implement the modification approaches, on the other hand, directly into their current analyses without great upset.[53]

Though all more practicable than the "third category" and "assumption shifting" approaches, not all modification approaches bear the same degree of practicability—or even desirability. For example, some recent proposals—such as that of Cunningham-Parmeter—add greatly to the judicial burden in platform cases while offering comparatively little clarity or insight.[54] Such proposals seem to only add to the confusion surrounding

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Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31 (2016) (advocating a "dependent contractor" status).

50. *See infra* Section II.B; *see also* Mark J. Loewenstein, *Agency Law and the New Economy*, 72 BUS. LAW. 1009, 1034–44 (2017).

51. *See infra* Section II.B.

52. *See* Means & Seiner, *supra* note 28, at 1516 (noting that a "significant advantage" of their modification approach is that it does not require implementation of new legislation).

53. *Id.*

54. Cunningham-Parmeter offers a modified approach to traditional worker status distinctions. *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673 (2016). His modified "control" test asks courts to expand their traditionally narrow concept of control to explicitly incorporate "the subjects of control," "the directions of control," and "the obligations of control." *Id.* at 1674. By addressing these three aspects of control, Cunningham-Parmeter suggests that courts can identify employers who "meaningfully influence working conditions," and overturn the "layers of contractual relationships" that frequently "obscure that power." *Id.* Though helpful for establishing "the outer limits of employer-employee relationships" as an academic exercise, Cunningham-Parmeter's proposed test proves too sweeping and cumbersome for any court to adopt—especially those in South Carolina. Rather than narrow a court's focus, Cunningham-Parmeter's test substantially broadens it. For example, the proposed "subject of control" inquiry alone—only one of three—asks courts to not only examine "direct supervision" but also "a company's overall ability to shape the contours of performance-related expectations." *Id.* at 1678. As an illustration, Cunningham-Parmeter provides the following example:

> [I]f a large firm controls every aspect of its relationship with a subcontractor or an independent contractor (such as the manner in which a product is produced, the

platform employment by increasing the number and scope of factors for judicial consideration.[55] Ultimately, even if such approaches offered reliable and proper employment status decisions, their burden of application would still outweigh their benefits.

Other modification approaches—like that proposed by Brown—are too general and sweeping to provide nuanced determinations.[56] In fact, though

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> labor costs for producing the product, and the timeline for delivering the product), then this direct control over labor-based outcomes provides the firm with effective control over working conditions as well.

Id. at 1678. When courts finish this gargantuan inquiry, Cunningham-Parmeter's approach then asks them to examine the test's second prong—"the direction that control travels between firms and workers"—and its third—"the obligations that larger, end-user firms have to prevent unlawful employment practices." *Id.* What's more, Cunningham-Parmeter admits that his modified control test "does not mean that courts should focus exclusively on the concept of control at the expense of other employment-related factors." *Id.* at 1679.

Accordingly, Cunningham-Parmeter's approach not only fails to narrow courts' focus, but it only invites further factual overload. Courts already struggle with endless considerations for distinguishing employees and independent contractors. They do not need a new list of considerations. Thus, in his attempt to solve worker status in the platform economy, Cunningham-Parmeter has articulated an unrealistically burdensome and labyrinthine approach.

55. *See, e.g.*, Lawson v. Grubhub, Inc., No. 15-CV-05128-JSC, 2017 WL 2951608, at *5–6 (N.D. Cal. 2017) (applying the *Borello* factors); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138–39 (N.D. Cal. 2015) (applying California's "right to control" test); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1075 (N.D. Cal. 2015) (applying the *Borello* factors but noting their insufficiency).

56. Brown advocates a modified version of the traditional employment test for platform employment. *See* Grant E. Brown, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. ENDNOTES 15 (2016). Brown's test simply asks courts to focus their analysis of platform employment on two questions within the traditional "economic realities" test: (1) whether a worker can improve his economic opportunity through managerial skills, and (2) whether the worker's services are integral to the employer's business. *Id.* at 16. The first question—sometimes called the "entrepreneurial opportunities test"—is designed to effectively categorize employees who nonetheless retain a high degree of control. *Id.* at 25. Following the *Restatement (Second) of Contracts*, Brown offers the classically problematic example of a full-time cook who retains a high degree of control over his work. *Id.* at 36. Though in control to some degree, the cook nonetheless remains an employee of his employer. *Id.* This example illustrates the limits of control's usefulness as a focal point. Like the cook, many employees retaining control over their work may still not have any opportunity to apply their own managerial skills to improve their economic opportunity. In Brown's view, courts should not consider such workers truly independent. When applied to Uber drivers, this "entrepreneurial opportunities" factor preponderates for an employment relationship in every case. As Brown notes, for example, "Uber drivers cannot improve their economic position through managerial skill" because their only method of increasing economic opportunity is driving more hours. *Id.* at 37. Thus, for Brown, *all* Uber drivers fail the "entrepreneurial opportunities test" and are accordingly Uber's employees. Consequently, unlike the "worker flexibility" approach of Means and Seiner, Brown's test permits no granularity. Thereunder, a Wal-Mart cashier driving for Uber five hours per month

framed as objective "tests," Brown's and some other approaches are heavily weighted toward an employee determination.[57] Thus, they ring too activistic to be of much assistance to judges—especially in conservative jurisdictions like South Carolina.

The most promising modification approach for South Carolina is the Means-Seiner "worker flexibility" approach. This approach suggests that courts evaluate "worker flexibility" to determine a given platform economy worker's status.[58] Means and Seiner base their proposal on a "crucial, often dispositive" question: "How much flexibility does the individual have in the working relationship?"[59] In practice, as they note, this question frequently turns on scheduling.[60] For example:

> The more flexible a worker's schedule is—and the more control a worker has over her daily routine—the more likely that individual is an independent contractor. By contrast, if an employer dictates the

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in his spare time is just as much an Uber employee as someone driving forty hours per week and solely dependent on Uber for income. Brown's second factor—the integrality of Uber drivers to Uber—poses additional problems for the classification of Uber drivers. Indeed, it begs the central question of Uber cases: is Uber a technology company facilitating independent drivers or a driving company offering employees more independence? In either case, Uber drivers are integral to the company's success—but only in the latter are they employees. In answering this question, Brown dismissively states that "Uber is undoubtedly in the transportation business." *Id.* at 39. He bases his conclusion on three observations: (1) Uber's business is specific; (2) Uber has previously advertised itself as a technology company; and (3) Uber is deeply involved in marketing and managing drivers and prices. *Id.* All three sidestep a complicated analysis and ultimately offer little insight into Uber's nature.

Firstly, the specificity of Uber's business is irrelevant; TurboTax does not employ independent accountants simply because its business is based in part on their use of the program. Moreover, Uber's advertisements offer limited insight into the company's true nature because they are frequently contradictory. For example, though it has previously called itself an "on-demand car service," Uber's legal page informs readers that "Uber is a technology company that has developed an app that connects users (riders) with third party transportation providers." *See Uber Guidelines for Third Party Data Requests and Service of Legal Documents*, UBER, https://www.uber.com/legal/data-requests/guidelines-for-third-party-data-requests/en/ (last visited Apr. 15, 2018). Thus, Brown's conclusion that Uber is a "transportation company" is premature and ought not serve as the basis for drivers' worker status. The nature of Uber is less clear than Brown intimates, and—whether employees or not—Uber drivers are integral to its business. Thus, Brown's second factor is ultimately unhelpful for determining the worker status of Uber drivers. Like Cunningham-Parmeter's approach, Brown's proposed two-factor test appears less helpful for South Carolina than Means and Seiner's "worker flexibility" evaluation.

57. *See, e.g.*, *id.*

58. Means & Seiner, *supra* note 28.

59. *Id.* at 1535.

60. *Id.*

> worker's schedule, the inflexibility of the worker's schedule would indicate an employment relationship.[61]

Thus, unlike the approach of Brown and the others mentioned above, the worker flexibility approach allows specificity and avoids overgeneralization. Under it, two workers for the same platform may have a different employment status:

> For example, someone signed up as a driver on the Uber or Lyft platforms may have other full-time employment and drive only occasional hours when the opportunity arises. To the extent Uber and Lyft accommodate drivers' schedules, the flexibility of the relationship should weigh heavily in favor of a finding that the drivers are independent contractors. Indeed, many if not most Uber and Lyft drivers may fall in this category. By contrast, FedEx drivers who work regular schedules seem to fall within the employment category, regardless of whether FedEx attempts to structure an independent contractor relationship.[62]

By focusing courts' examinations on worker flexibility, the Means-Seiner approach allows specificity, nuance, and avoids erroneous classifications based on generalized categories of workers.[63]

Moreover, the Means-Seiner approach is noteworthy outside of its substantive appeal. Importantly, as Means and Seiner note, any court examining the "economic reality" of a working relationship is probably already obligated to consider worker flexibility because it "clarifies the economic independence of working relationships."[64] Thus, no legislative or jurisprudential reform is necessary whatsoever for adoption of this approach.[65] Rather, Means and Seiner simply rearticulate and reinvigorate the traditional test. Thus, based on feasibility alone, this approach seems the most promising for South Carolina's conservative jurisprudence.

To be sure, the worker flexibility test still requires cumbersome, factually-intensive judicial analysis of each case. Thus, it fails to alleviate an

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61. *Id.*

62. *Id.* at 1541–42.

63. Interestingly, as detailed below in Part III.A, the South Carolina Supreme Court has stated its disapproval of reliance on sweeping categorical determinations in *Lewis v. L.B. Dynasty, Inc.* (*Lewis 2015*), 411 S.C. 637, 770 S.E.2d 393 (2015).

64. Means & Seiner, *supra* note 28, at 1516.

65. *Id.*

often-lamented characteristic of worker status determinations.[66] However, the "worker flexibility" approach also appears the most promising based on its simplicity, concreteness, and predictability. Its adoption would at least narrow judicial focus to a subset of facts. Thus, while imperfect, the worker flexibility approach seems the best yet offered for South Carolina.

A desirable model of platform employment is simple, concrete, consistent, and flexible. Thus far, only Means and Seiner's "worker flexibility" model meets—or at least approaches—all four criteria. Moreover, it requires no activist legislative or jurisprudential reform. Because "worker flexibility" is the most desirable—and ultimately the most feasible—model of platform economy employment, South Carolina should look to it when modifying its own jurisprudence.

III. EXOTIC DANCERS' WORKER STATUS IN SOUTH CAROLINA

South Carolina courts' determinations of exotic dancers' worker status offer insight into their likely platform employment determinations. In making their exotic dancer determinations, South Carolina courts have applied statutory-specific tests ultimately traceable to the common law.[67] In South Carolina, worker status determinations generally turn on a putative employer's right to control the worker.[68] In fact, this focus on the right to control has roots deep in English legal history.[69] Accordingly, today the

66. *See, e.g.*, Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (noting that economy "'reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope").

67. See generally *infra* note 69 for a discussion of the historical development of worker status.

68. Debbie Whittle Durban, *Independent Contractor or Employee?*, 21 S.C. LAW. 31, 34 (2010).

69. The modern legal distinction between "employees" and "independent contractors" has deep roots in American jurisprudence. In fact, the conceptual basis for this distinction extends back to pre-Conquest England. Thus, to fully understand the complexities of modern platform economy employment, we must understand at least some of the "historical baggage" of the employee/independent contractor distinction. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 309 (2001). The common law's approach to the employer/employee relationship derives from its earlier approach to the master/servant relationship. *See, e.g.*, *passim* Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 YALE J.L. & HUMAN. 205, 207 (2013); *see also* Allen v. Columbia Fin. Mgmt., Ltd., 297 S.C. 481, 488, 377 S.E.2d 352, 356 (Ct. App. 1988); Bowen v. U.S. Capital Corp., 295 S.C. 201, 204, 367 S.E.2d 474, 476 (Ct. App. 1988) ("In determining whether someone is an independent contractor or a servant, the proper test is whether the alleged master has the right and authority to control and direct the manner or means of accomplishing

right to control examination underlies virtually all jurisdictions' analyses nationwide. However, in determining a putative employer's degree of control over a worker, courts implement a variety of tests based on the nature of the action at hand.[70] Some of the most common—and here the most relevant—types of actions in South Carolina are state court claims brought for workers' compensation and federal court claims brought under the Fair Labor Standards Act (FLSA).[71]

South Carolina courts apply a four-factor test to employment status in workers' compensation claims, analyzing (1) direct evidence of the putative employer's right or exercise of control; (2) its furnishing of equipment; (3) its method of payment; and (4) its right to fire.[72] However, South Carolina's federal courts—following Fourth Circuit precedent—apply a six-factor test

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the work."); Republic Textile Equip. Co. of S.C. v. Aetna Ins. Co., 293 S.C. 381, 387, 360 S.E.2d 540, 543 (Ct. App. 1987) (discussing a "master-servant relationship"); Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375–76 (Ct. App. 1984) ("In determining whether an individual is a servant (employee) or an independent contractor, the proper test to be applied is not the actual control exercised by the alleged master, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment."). Indeed, as the South Carolina Court of Appeals explicitly recognized, "the words 'employer' and 'employee' are outgrowths of the older terms 'master' and 'servant.'" *Allen*, 297 S.C. at 488, 377 S.E.2d at 356. Though the employee/independent contractor distinction's conceptual underpinnings recede back to pre-Conquest England, the distinction itself can be traced to Early Modern England. *See* Atkinson, *supra* note 69, at 206. The "household government" system, wherein the master of a household exercised "domestic rule" over his dependents such as wives, children, servants and slaves, was prominent throughout Early Modern England. In fact, this system governed most pre-industrial work relationships. *Id.* at 208. Importantly, the hierarchical relationships between these dependents and the head-of-household involved reciprocal rights and responsibilities, namely the duty of dependents to obey their master in exchange for his protection. *Id.* For example, in return for masters' control over their lives, servants were legally entitled to necessities like food, clothing, lodging, and medical care. In fact, these "servants" primarily, but not always, lived *intra moenia*—"within the walls" of the master's house. *Id.* This system predominated throughout the Early Modern period, and the British colonists transplanted this system to America with little alteration. *Id.* The modern employee ultimately has his or her roots in this system, and in fact never completely "shook free of the household." *See* Atkinson, *supra* note 69, at 207.

70. *See supra* note 69.

71. *See* Durban, *supra* note 68, at 33–34.

72. *See, e.g.*, Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 475–76, 753 S.E.2d 416, 419 (2013). It seems that *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 199, 174 S.E.2d 397, 399 (1970), first established the four-factor test in South Carolina. From 2000 to 2009, South Carolina courts held the view that "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation." *See* Dawkins v. Jordan, 341 S.C. 434, 439–40, 534 S.E.2d 700, 703–04 (2000). However, in 2009, the South Carolina Supreme Court re-clarified that the four factors operated "with equal force in both directions." Wilkinson *ex rel.* Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009).

to claims brought under the Fair Labor Standards Act, analyzing (1) the putative employer's degree of control over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on managerial skill; (3) the worker's investment in equipment, material, or other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the integrality of the worker's services to the putative employer's business.[73] Though differing in articulation, the four-factor and six-factor tests are frequently indistinguishable in practice and commonly return the same results.[74] However, as will be seen, certain differences could become important in the context of platform economy employment.[75]

South Carolina courts have thoroughly examined the worker status of exotic dancers at least three times,[76] and the Fourth Circuit Court of Appeals has done so at least once.[77] These cases involved exotic dancers' claims under South Carolina's Workers' Compensation Law and the Fair Labor Standards Act. And in each case the courts deemed the exotic dancers employees of the clubs at which they performed.[78]

A. Lewis v. L.B. Dynasty, *411 S.C. 637, 770 S.E.2d 393 (2015).*

South Carolina courts' most recent analysis of exotic dancers' worker status comes from *Lewis v. L.B. Dynasty*, in which the South Carolina Supreme Court held that an exotic dancer was an employee under the state

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73. Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 304–05 (4th Cir. 2006). The Supreme Court of the United States first articulated this test in *United States v. Silk*, 331 U.S. 704 (1947).

74. *See* Durban, *supra* note 68, at 34.

75. *See infra* Part IV.

76. *See* Sodekson v. East Coast Rest. & Nightclubs, LLC, No. 4:15-CV-02711-RBH, 2016 WL 4613386 (D.S.C. Sept. 6, 2016) (resulting in a consent judgment through which defendant voluntarily alleged unpaid wages under the FLSA); Gardner v. Country Club, Inc., No. 4:13-cv-03399-BHH, 2015 WL 7783556, at *17 (D.S.C. Dec. 3, 2015) (finding exotic dancers were employees under the FLSA); Degidio v. Crazy Horse Saloon and Rest., Inc., No. 4:13-cv-02136-BHH, 2015 WL 5834280, at *14 (D.S.C. Sept. 30, 2015) (finding exotic dancers were employees under the FLSA); Dittus v. KEG, Inc., Nos. 3:14-cv-00300-JFA, 0:14-cv-03029-JFA, 2014 WL 6749183 (D.S.C. Dec. 1, 2014) (resulting in out-of-court settlement and prompting no decision on employment status); Lewis v. L.B. Dynasty, Inc. (*Lewis 2015*), 411 S.C. 637, 646, 770 S.E.2d 393, 398 (2015) (finding an exotic dancer was an employee under the Workers' Compensation Act); Lee v. Regal, Inc., No. 2008-UP-071, 2008 WL 9832882, at *2 (Ct. App. Jan. 24, 2008) (simply noting that an exotic dancer was "employed by" a club).

77. *See* McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235 (4th Cir. 2016) (finding dancers were employees under the FLSA).

78. *See infra* Sections III.A–D.

Workers' Compensation Law.[79] The plaintiff in *Lewis*, an exotic dancer, was struck in the abdomen by an errant bullet at a Columbia, South Carolina club called the Studio 54 Boom Boom Room (Boom Boom Room).[80]

Lewis, the plaintiff, was a nineteen-year-old exotic dancer based in Charlotte.[81] She primarily performed at a single club in Charlotte, but spent two to three nights per week working at other clubs throughout the Carolinas.[82] She earned roughly $300 in cash per night.[83] One of the South Carolina clubs at which she worked was the Boom Boom Room, an establishment at which she had performed twice before the night of the incident.[84]

Lewis had no written agreements with the Boom Boom Room and on each night had spontaneously arrived there "uninvited and unannounced."[85] Upon arrival at the club, she presented identification proving her age, underwent a search, reviewed and signed the club's "rules sheet," and paid the required tip-out fee.[86] She then changed her outfit in the club's dressing rooms and found her place on the schedule of stage dances which the club devised once the dancers arrived.[87]

Under the arrangement, Lewis would receive a fine if she failed to perform a stage dance at her slated time.[88] In addition to stage dances, however, Lewis also performed table dances and V.I.P. dances.[89] In fact, the club required her to perform V.I.P. dances in its private rooms for any patron who requested one.[90] It also set a minimum price for these dances, and it required a cut of their proceeds.[91] Presumably, Lewis performed table and V.I.P. dances when she was not performing stage dances. Importantly, if Lewis violated any provision of the rules sheet she signed upon entry—including prohibitions against fighting, below-waist nudity, and sexual activity in the club—she could be fined or "fired."[92]

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79. *See Lewis 2015*, 411 S.C. at 646, 770 S.E.2d at 398.
80. *Id.*
81. *Id.* at 639, 770 S.E.2d at 394.
82. *See* Lewis v. L.B. Dynasty, Inc. (*Lewis 2012*), 400 S.C. 129, 131, 732 S.E.2d 662, 663 (Ct. App. 2012), *rev'd*, 411 S.C. 637, 770 S.E.2d 393 (2015).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 132, 732 S.E.2d at 663.
87. *Id.*
88. *Id.*
89. Lewis v. L.B. Dynasty, Inc. (*Lewis 2015*), 411 S.C. 637, 640, 770 S.E.2d 393, 394 (2015).
90. *Id.* at 639, 770 S.E.2d at 394.
91. *Id.*
92. *Id.*

On her third night performing at the Boom Boom Room, a fight broke out and Lewis was struck in the abdomen by a stray bullet.[93] The bullet severely damaged her intestines, liver, pancreas, kidney, and uterus.[94] After the incident, Lewis filed a workers' compensation claim "requesting temporary total disability benefits and medical treatment from the date of the accident."[95] However, the South Carolina Uninsured Employer's Fund disputed the claim on her putative employer's behalf.[96] It argued she was an independent contractor rather than an employee of the Boom Boom Room.[97] The Workers' Compensation Commission (Commission) deemed her an independent contractor and denied compensation.[98]

Lewis appealed this decision, but the Commission's appellate panel affirmed it.[99] She then appealed to the South Carolina Court of Appeals, which in turn affirmed the appellate panel's decision.[100] However, the South Carolina Supreme Court ultimately reversed this decision, finding that "the details of her professional relationship preponderate[d] in favor of finding she was an employee."[101]

In making its determination, the court applied the four-factor "right to control" test, examining (1) direct evidence of the employer's right to or exercise of control; (2) the employer's furnishing of equipment; (3) the employer's method of payment; and (4) the employer's right to fire the plaintiff.[102] The court explicitly rejected any "attempt[s] to broadly characterize the nature of her profession prior to engagement in the analysis,"[103] chastising the court of appeals' "unnecessary" and prejudicial observation that she was "an itinerant artistic performer."[104]

The supreme court found that the first factor—the employer's right to control—weighed in favor of an employment relationship.[105] It found that the Boom Boom Room's procedures upon Lewis's arrival evidenced control, including its requirements that she pay a tip-out, undergo a search, and

93. *Id.* at 640, 770 S.E.2d at 394.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 640, 770 S.E.2d at 395.
99. *Id.* at 641, 770 S.E.2d at 395.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 642, 770 S.E.2d at 395.
104. *Id.*
105. *Id.* at 641, 770 S.E.2d at 396.

review the rules sheet.[106] The club's ability to refuse her entry if her appearance was undesirable also supported its right to control.[107] The court also focused on the club's control during Lewis's shift, finding its control of the music, the establishment of a stage dance schedule, and the establishment of minimum V.I.P. dance fees suggested an employment relationship.[108] While admitting she "had no set schedule, and came when she chose with no other repercussion than the loss of income," the court found that "once [the Club] engaged her for the evening, it exercised significant control over the performance of her work."[109]

In its analysis, the supreme court castigated the court of appeals' "myopic view" of the club's right to control.[110] The court of appeals narrowly based its determination of the right to control factor on Lewis's "complete discretion" "while the dance is going on."[111] It noted that "[t]he extent to which an exotic dancer in the Boom Boom Room decides the manner in which she performs her dance to satisfy the club's customers . . . is not subject to any limitation or control by the club."[112] Accordingly, the courts' competing decisions can be attributed to their degree of focus.

The South Carolina Supreme Court also found that the second factor—the employer's furnishing of equipment—preponderated in favor of an employment relationship.[113] The court noted that "other than her costume, Lewis brought no other equipment to the Club."[114] It refuted the court of appeals' suggestion that her body was—or even could be—her "equipment."[115] Because the club provided her "an area for V.I.P. dances, a stage with a pole, tables, and a sound system," the supreme court found the second factor weighed in favor of an employment relationship.[116]

However, the supreme court found that the third factor—method of payment—did not weigh in favor of an employment relationship.[117] Lewis

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 643, 770 S.E.2d at 396.
110. *Id.* at 642, 770 S.E.2d at 396.
111. Lewis v. L.B. Dynasty, Inc. (*Lewis 2012*), 400 S.C. 129, 134, 732 S.E.2d 662, 664 (Ct. App. 2012), *rev'd*, 411 S.C. 637, 770 S.E.2d 393 (2015).
112. *Id.*
113. *Lewis 2015*, 411 S.C. at 643, 770 S.E.2d at 396.
114. *Id.* at 644, 770 S.E.2d at 397.
115. *Id.* at 643, 770 S.E.2d at 396.
116. *Id.* at 644, 770 S.E.2d at 397.
117. *Id.* at 645, 770 S.E.2d at 397.

admitted in her brief that the club paid her nothing.[118] Rather, "*she paid the club* for the right to perform."[119] According to both the supreme court and the court of appeals, this factor clearly preponderated against an employment relationship.[120]

Dissimilarly, the supreme court found that the fourth factor—the right to fire—did weigh in favor of an employment relationship because the club could both refuse her initial entry and terminate her for violating the rules.[121] Though noting that "in any relationship there exists some right to terminate the arrangement," it distinguished "the absolute right to terminate the relationship without liability" from those in which a worker had a "legal right to complete the project."[122] Thus, the court examined whether liability would accrue to the employer "if the work [were] prematurely interrupted."[123] If so, this factor would weigh against an employment relationship. The court ultimately found that "once she was hired for the night, the Club could end that relationship prior to her shift ending and leave Lewis with no recourse for that firing."[124]

The court of appeals, however, reasoned that "[a]ny business has a right to impose conditions on those to whom it pays money for work, regardless of whether the worker is an independent contractor or an employee."[125] While the supreme court accepted the notion that Lewis could be "hired for the night,"[126] the court of appeals disparagingly noted that "the employment 'relationship' Lewis claims existed was never contemplated to last more than one night in the club."[127] It further noted that "[a]ny business that pays for work to be performed on its premises is free to terminate the relationship for the type of conduct" in the rules, "even when the work is being performed by an independent contractor."[128] The courts' differing opinions seem to turn on (1) the notion that Lewis could be hired "for the night" and (2) the notion that the rules were specific enough to substantially control Lewis's conduct. Finding that three out of four factors weighed in favor of

118. Lewis v. L.B. Dynasty, Inc. (*Lewis 2012*), 400 S.C. 129, 133, 732 S.E.2d 662, 665 (Ct. App. 2012), *rev'd*, 411 S.C. 637, 770 S.E.2d 393 (2015).

119. *Id.* at 135, 732 S.E.2d at 665.

120. *Lewis 2015*, 411 S.C. at 645, 770 S.E.2d at 397; *Lewis 2012*, 400 S.C. at 136, 732 S.E.2d at 665.

121. *Lewis 2015*, 411 S.C. at 646, 770 S.E.2d at 398.

122. *Id.* at 645–46, 770 S.E.2d at 397.

123. *Id.* at 646, 770 S.E.2d at 397.

124. *Id.* at 646, 770 S.E.2d at 398.

125. *Lewis 2012*, 400 S.C. at 136, 732 S.E.2d at 666.

126. *Lewis 2015*, 411 S.C. at 646, 770 S.E.2d at 398.

127. *Lewis 2012*, 400 S.C. at 136, 732 S.E.2d at 665.

128. *Id.* at 136, 732 S.E.2d at 666.

an employment relationship, the South Carolina Supreme Court held that Lewis was an employee of the Boom Boom Room under the Workers' Compensation Law.[129]

B. Gardner v. Country Club, Inc., *2015 WL 7783556 (D.S.C. 2015).*

In *Gardner v. Country Club, Inc.*, the United States District Court for the District of South Carolina held as a matter of law that an exotic dancer was an employee under the Fair Labor Standards Act.[130] The plaintiff in *Gardner*, an exotic dancer acting on behalf of herself and other dancers, alleged a Myrtle Beach, South Carolina "topless adult night club" denied her minimum wage and overtime compensation in violation of the FLSA.[131]

On the surface, the relationship between dancer and club in *Gardner* seems analogous to that in *Lewis*. For example, like the "tip-out" fee in *Lewis*, Gardner paid a "house fee" for the right to dance upon arrival.[132] She also received a set of written rules after being permitted to dance—at least the first time she danced at the club.[133] She similarly performed various types of dances once inside, including table dances, couch dances, and V.I.P.-area dances.[134] As in *Lewis*, the Country Club set a minimum fee for each.[135] It also established a stage dance schedule for each night.[136] Additionally, the club controlled the music to which Gardner danced.[137] Thus, the relationships in *Gardner* and *Lewis* appear similar from a large-scale perspective.

However, Gardner's relationship with the Country Club differs from the *Lewis* relationship in key ways. Importantly, Gardner had a fixed schedule with the club; it required her to work four shifts per week and "at least one Sunday, Monday, or Tuesday shift each week and at least one 'happy hour shift' each week."[138] Moreover, its rules went far beyond those in *Lewis*, including:

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129. *Lewis 2015*, 411 S.C. at 646, 770 S.E.2d at 398.

130. Gardner v. Country Club, Inc., No. 4:13-cv-03399-BHH, 2015 WL 7783556 (D.S.C. Dec. 3, 2015).

131. *Id.* at *1.

132. *Id.* at *3.

133. *Id.* at *6.

134. *Id.* at *3.

135. *Id.*

136. *Id.* at *6.

137. *Id.* at *8.

138. *Id.* at *7.

> a requirement that entertainers check in with the house mom, a requirement that entertainers who drive utilize valet parking, a prohibition on significant others in the Club while an entertainer is working, the requirement that all entertainers take a breathalyzer . . . a prohibition on chewing gum, and the requirement that all entertainers obtain a "See-Ya Pass" from the house mom before leaving work.[139]

These rules differ substantially from those administered by the Boom Boom Room in *Lewis*. Thus, while from a distant perspective the facts of *Lewis* and *Gardner* seem analogous, closer inspection reveals key distinctions in their respective employment relationships.

After intensely detailing the facts of Gardner's relationship with the Country Club,[140] the court applied the six-factor "economic reality" test and found an employment relationship existed.[141] In analyzing the first factor—the employer's degree of control over the manner in which work is performed—the court analyzed the club's dress code requirements, sign-in requirements, stage schedules, house fees, establishment of minimum dance fees, tip-sharing requirements, and its "policies intended to maintain a sense of class."[142] Taken together, these specific requirements evidenced the club's considerable control over Gardner and weighed in favor of an employment relationship.[143]

The court found that the second factor—opportunities for profit or loss—also weighed in favor of an employment relationship.[144] Though noting that dancers might be able to "'hustle' to increase their profits," the court found that Gardner had "relatively minimal opportunities for profit or loss."[145]

Similarly, the court found that the third factor—the capital investments of the parties—also preponderated for an employment relationship.[146] While operation of the club was a large capital investment on the employer's behalf, "the plaintiff's investment consist[ed] of house fees and the costs

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139. *Id.* at *6.

140. *Id.* at *21 ("The Court has written a great deal, but said very little that is new. The defendant now has a thorough statement of reasons explaining why its case is 'virtually identical to *Degidio*, which it has known from the outset, and why the same result is required in both cases.").

141. *Id.* at *12.

142. *Id.* at *13–15.

143. *Id.* at *15.

144. *Id.*

145. *Id.*

146. *Id.* at *16.

associated with her appearance and dress, including a wardrobe of gowns and shoes for exotic dancing."[147] Given this wide disparity, the court found the "investment" factor weighed in favor of an employment relationship.[148]

The fourth factor—degree of skill required for the work—likewise suggested an employment relationship.[149] Though the club maintained that its hiring practices were "highly selective," the court found that "a majority of those who appl[ied] [were] hired and that physical appearance [was] the primary consideration."[150] The court declined to consider attractiveness "a 'skill.'"[151] Thus, it found that the fourth factor weighed "in favor of finding an employer-employee relationship."[152]

However, the court found that the fifth factor—the permanence of the working relationship—weighed in favor of independent contractor status.[153] The nature of the adult entertainment business is "transient," and Gardner only danced at the club "for a matter of months."[154] Thus, this sole factor preponderated against an employment relationship.[155]

Finally, the court found that the sixth factor—the degree of integrality to the employer's business—weighed in favor of an employment relationship.[156] Simply put, it found that "exotic dancers are integral to operations as a gentleman's club."[157]

Given the clear preponderance of the factors toward an employment relationship, the court found that Gardner was an employee of the Country Club under the FLSA.[158] Moreover, it castigated the club's emphasis on "minutia and semantics over substance."[159]

C. Degidio v. Crazy Horse Saloon and Restaurant, *2015 WL 5834280 (D.S.C. 2015).*

In *Degidio v. Crazy Horse Saloon and Restaurant*, the United States District Court for the District of South Carolina held that an exotic dancer

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at *16–17.
154. *Id.* at *16.
155. *Id.* at *17.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*

was an employee under the Fair Labor Standards Act.[160] The plaintiff in *Degidio*, an exotic dancer acting on behalf of herself and other dancers, alleged a Myrtle Beach, South Carolina "upscale gentlemen's club" denied her minimum wage and overtime compensation in violation of the FLSA.[161]

The facts of *Degidio* are highly analogous to those of *Gardner*, and the court even noted in *Gardner* that its "analysis was essentially the same in both cases."[162] However, the cases differed in a few substantial aspects.[163] For example, unlike in *Gardner*, in *Degidio* the employer had records indicating its dancers were "independent contractors."[164] In *Degidio*, the court specifically noted that Crazy Horse Saloon's dancers "often work[ed] at multiple places or move[d] from one city to another depending on the season," and they were "not restricted from performing at other adult night clubs, holding down other jobs, or attending school."[165] Additionally, while the *Degidio* dancers were "permitted to eat meals, consume alcohol and smoke cigarettes, and talk on the telephone while in the Club,"[166] they were also required to wear "gowns to the ankle."[167] The club in *Degidio* also implemented a streamed webcast of dancers on the main stage and in their dressing room.[168]

While these select facts distinguished *Degidio* from *Gardner*, the court similarly held that all but one of the factors in the six-factor "economic reality" test weighed in favor of an employment relationship.[169] Just as in *Gardner*, only the relative impermanence of the work relationship preponderated against an employee classification.[170]

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160. Degidio v. Crazy Horse Saloon and Rest., Inc., No. 4:13-CV-02136-BHH, 2015 WL 5834280, at *24 (D.S.C. Sept. 30, 2015).

161. *See id.* at *1, *4. The plaintiff alleged the actions violated the South Carolina Payment and Wages Act, which the court found was preempted by FLSA. *Id.* at *4.

162. *Gardner*, 2015 WL 7783556, at *1.

163. *See infra* notes 164–168 and accompanying text.

164. *Compare Gardner*, 2015 WL 7783556, at *11–17 (discussing the relationship between the defendant and exotic dancers and not mentioning whether the defendant held records indicating the dancers were independent contractors), *with Degidio*, 2015 WL 5834280, at *20 (stating that the record indicates the entertainers are classified as independent contractors).

165. *Degidio*, 2015 WL 5834280, at *13 (citations omitted).

166. *Id.* at *8 (citations omitted).

167. *Id.* (citations omitted).

168. *Id.* at *10 (citations omitted).

169. *Id.* at *14.

170. *Id.* at *13.

D. McFeeley v. Jackson Street Entertainment, *825 F.3d 235 (4th Cir. 2016).*

In *McFeeley v. Jackson Street Entertainment*, the United States Court of Appeals for the Fourth Circuit held that an exotic dancer was an employee under the Fair Labor Standards Act.[171] The plaintiff in *McFeeley*, an exotic dancer acting on behalf of herself and other dancers, alleged two Maryland "exotic dance clubs" owned and managed by the same person denied her minimum wage in violation of the FLSA.[172]

The facts of *McFeeley* are in many respects similar to *Degidio*, *Gardner*, and *Lewis* set out above.[173] Before dancing at the club, McFeeley "was required to fill out a form and perform an audition."[174] Moreover, upon her hiring, the club required her to sign an agreement titled "Space/Lease Rental Agreement of Business Space," which explicitly categorized her as an independent contractor.[175] It also required her to pay a "tip-in" upon her arrival at the club.[176] Like in the previous cases, McFeeley danced both on stage and in other areas of the club.[177] After dancers became familiar to the clubs, they assigned them a set schedule.[178] For example, one dancer testified to working Tuesdays and Thursdays at one club and Mondays, Wednesdays, Fridays, and Saturdays at the other.[179] The club also enforced written guidelines prohibiting activities like "drinking while working, smoking in the club's bathroom, and loitering in the parking lot after business hours."[180] Moreover, it set minimum fees for dancers' performances, managed the club's atmosphere and music, and even sometimes "coached" dancers.[181]

The Fourth Circuit applied the six-factor "economic reality" test and ultimately found an employment relationship existed between McFeeley and the clubs.[182] The court found that the first factor—the employer's control over work—weighed in favor of an employer/employee relationship based

171. McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 244 (4th Cir. 2016).
172. *Id.* at 239.
173. *See supra* Sections III.A–C.
174. *McFeeley*, 825 F.3d at 239.
175. *Id.*
176. *Id.*
177. *Id.*; *see, e.g.*, *supra* Sections III.A–C (detailing the factual background of the aforementioned cases).
178. *McFeeley*, 825 F.3d at 242.
179. *Id.*
180. *Id.*
181. *Id.* (citations omitted).
182. *Id.* at 244.

on the clubs' "'significant control' over how plaintiffs performed their work."[183]

The court also found that both the second and third factors—the workers' opportunities for profit or loss and the workers' investments, respectively—preponderated in favor of an employment relationship.[184] Though the dancers to some extent "relied on their own skill and ability to attract clients" by selling tickets for entrance, "distribut[ing] promotional flyers, and putt[ing] their own photos on the flyers," the court found this did not evidence their independent opportunity for profit or loss.[185] Rather, it reasoned that "[i]t is natural for an employee to do his part in drumming up business for his employer, especially if the employee's earnings depend on it."[186] Moreover, the dancers' investments were "limited to their own apparel and, on occasion, food and decorations they brought to the clubs."[187]

Before addressing the remaining factors, the Fourth Circuit noted their peripherality to exotic dancer cases generally.[188] The court dismissed the fourth factor, noting that the skill level required of exotic dancers was low. Moreover, it accorded "little weight" to the fifth, citing the "inherently itinerant" nature of the dancers' work.[189] In addressing the sixth factor, the court simply noted that an "exotic dance club could [not] function, much less be profitable, without exotic dancers."[190] Thus, the court found that all factors either weighed in favor of an employment relationship or were ambiguous. It accordingly deemed McFeeley and other dancers employees of the clubs.[191]

In summary, exotic dancers have been deemed clubs' employees in every case determined by South Carolina courts and the Fourth Circuit thus far. Though both the factual scenarios and the legal tests differ slightly between *Lewis*, *Gardner*, *Degidio*, and *McFeeley*, the courts' focuses are largely the same. For example, all four cases examine the employment relationship through a similarly distanced perspective; they do not narrow their focus to the dancing itself, nor do they expand their focus to the

183. *Id.* at 242.

184. *Id.* at 243 (quoting Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 305 (4th Cir. 2006)).

185. *McFeely*, 825 F.3d at 243.

186. *Id.*

187. *Id.* (citations omitted).

188. *Id.* at 244.

189. *Id.*

190. *Id.* (quoting Brief of the Secretary of Labor as Amici Curiae Supporting Plaintiffs-Appellees, McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235 (4th Cir. 2016) (No. 15-1583), 2015 WL 9315891, at *24).

191. *Id.* at 244.

dancers' lives outside the clubs. Rather, they focus on the dancers' and the employers' activities throughout the night from entry in to exit from the building.

Additionally, the courts unanimously viewed exotic dancing as requiring a small degree of skill and little capital investment. Moreover, the courts did not envision better dancing equating to higher earnings; they unanimously found that dancers lacked any ability to increase earnings aside from working additional hours.

Drawing from these decisions, we may now explore South Carolina's likely determinations of platform economy employment cases.

IV. PREPARING SOUTH CAROLINA FOR PLATFORM ECONOMY EMPLOYMENT

South Carolina courts have not yet had the opportunity to analyze a platform economy employment case. However, as highlighted above, they have addressed factually analogous issues from a surprising source: exotic dancers. Thus, to determine South Carolina's readiness for platform economy employment disputes, we have examined those analogous opinions. Based on the examination above, we can now approximate a South Carolina court's ruling on a platform employment case if it arose within our current jurisprudence. This Part first offers such an approximation applied to a hypothetical case with the same facts as the seminal *O'Connor v. Uber*.[192] It then compares South Carolina's probable jurisprudence with the Means-Seiner model of platform economy employment.

A. Approximating South Carolina's Platform Employment Jurisprudence

If a South Carolina court was faced with facts similar to *O'Connor v. Uber*, it probably would deem the Uber driver an employee. Indeed, whether the driver worked full time and exclusively as an Uber driver or simply supplemented his income from another job with driving, a South Carolina court's analysis would probably find him an employee. For example, if the driver brought a state court claim under the Workers' Compensation Law, the court would likely apply a similar analysis as that found in *Lewis*.[193] The court would probably apply the same four-factor right to control test. As in *Lewis*, the court would likely apply an intermediate perspective to the employment relationship under this test; it would not narrow its focus to

192. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015).
193. *See supra* Section III.A.

Uber's control over the driver's driving, but it would not extend its focus to the driver's life outside his time on the app. In doing so, it would likely take Uber's Handbook's expectations that "[w]e expect on-duty drivers to accept all [ride] requests" or its suggestions that drivers "make sure the radio is off or on soft jazz or NPR" as evidence of control.[194] The fact that the driver could start and stop work unilaterally at his leisure would probably not weigh against an employment relationship under this factor, as in *Lewis* the dancer frequently came to the club "uninvited and unannounced."[195]

However, the court's likely handling of the "equipment" prong of the four-factor workers' compensation test is less clearly anticipated. The court might find that provision of a car is more meaningful than the provision of a dancer's costume or her body itself. However, because cars are widely owned and commonly used for activities outside Uber driving, the court might find that Uber drivers still seem "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments."[196] Moreover, Uber frequently helps its drivers secure cars by assisting with discounts or providing access to a licensed car in users' areas.[197] Thus, depending on the specific facts fixated upon, a South Carolina court may very well find that even the equipment factor preponderated for an employment relationship.

Moreover, the court's likely handling of the payment factor would probably also suggest an employment relationship. Like the dancer in *Lewis*, an Uber driver lacks control over his wages. Indeed, Uber's algorithm sets prices in real-time. Additionally, unlike *Lewis*, Uber drivers receive wages via direct deposit at regular intervals with predictable pay periods.[198] Thus, a South Carolina court would likely determine that even the method of payment factor suggested an employment relationship.

Finally, a South Carolina court's analysis of Uber's right to fire would probably suggest its employer status. As the club in *Lewis*, Uber sets rules and guidelines—violations of which can prompt deactivation of a user's

194. *O'Connor*, 82 F. Supp. 3d at 1149.

195. *See* Lewis v. L.B. Dynasty, Inc. (*Lewis 2012*), 400 S.C. 129, 132, 732 S.E.2d 662, 663 (Ct. App. 2012), *rev'd*, 411 S.C. 637, 770 S.E.2d 393 (2015).

196. Lewis v. L.B. Dynasty, Inc. (*Lewis 2015*), 411 S.C. 637, 644, 770 S.E.2d 393, 397 (2015) (quoting Terry v. Sapphire Gentlemen's Club, 336 P.2d 951, 959 (Nev. 2014)).

197. *Vehicle Solutions*, UBER, https://www.uber.com/en-SE/drive/vehicle-solutions/ (last visited Feb. 23, 2018).

198. *See Getting Paid*, UBER, https://www.uber.com/en-SG/drive/singapore/resources/getting-paid/ (last visited Feb. 23, 2018).

account.[199] Thus, despite likely acknowledging the driver's "right not to [drive] at all," the court would probably find that Uber could end its relationship with a driver and leave the driver with "no recourse for that firing."[200] It would likely view Uber's ability to deactivate drivers as analogous to the club's ability to end dancers' employment unilaterally.[201] It would thus probably find that the fourth factor suggested an employment relationship.

Accordingly, under the four-factor "right to control" test, a South Carolina court would probably deem a part-time Uber driver an employee of the company. Even if—like the dancer in *Lewis*—the Uber driver worked only a few times per month for the company at his whim, a South Carolina court might still find an employment relationship.

Similarly, if a South Carolina district court scrutinized a case with facts similar to *O'Connor v. Uber* under the FLSA's six-factor employment test and Fourth Circuit precedent, it would likely deem the Uber driver an employee. As indicated above, under the FLSA's six-factor test courts analyze (1) the putative employer's degree of control over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on managerial skill; (3) the worker's investment in equipment, material, or other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the integrality of the worker's services to the putative employer's business.[202] By applying the analyses undertaken in *Gardner*, *Degidio*, and *McFeeley*, a district court in South Carolina would likely deem Uber drivers employees.

As in *Gardner*, *Degidio*, and *McFeeley*, the court would likely find that the first factor—control over the manner in which work is performed—weighed in favor of an employment relationship. In the exotic dancer cases, the courts relied heavily on the clubs' sign-in requirements, stage schedules, establishment of minimum dance fees, and their "policies intended to maintain a sense of class" in making their employment determinations.[203] These facts are closely paralleled by Uber drivers' requirement to login to the Uber app, Uber's establishment of minimum fees as well as control over

199. *See Driver Deactivation Policy*, UBER, https://help.uber.com/h/ada3b961-e3c2-48e6-ac3f-2db5936e37a9 (last visited Feb. 23, 2018) ("A rider or driver who breaks the Uber code of conduct may be barred from using Uber on a temporary or permanent basis.").

200. *Lewis 2015*, 411 S.C. at 646, 770 S.E.2d at 398.

201. *Id.*

202. Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 304–05 (4th Cir. 2006).

203. *See, e.g.*, Gardner v. Country Club, Inc., No. 4:13-CV-03399-BHH, 2015 WL 7783556, at *14–15 (D.S.C. Dec. 3, 2015) (examining such policies as indicia of control).

fluctuations in fees, and its "suggestions" concerning car atmosphere.[204] Accordingly, a South Carolina district court would likely find that the first factor preponderated in favor of an employment relationship.

The court would likely find the same for the second factor—the worker's opportunities for profit or loss dependent on managerial skill. In the exotic dancer cases, the courts discounted the notion that the dancers' ability to "hustle," i.e., work more hours, constituted managerially-based opportunities for profit or loss.[205] Because the clubs awarded the dancers no additional funds for dancing "better," they had "relatively minimal opportunities for profit or loss."[206] Uber drivers analogously are not directly rewarded for "better" driving and can only increase their profits by driving additional hours. Thus, a South Carolina court would likely find that the second factor also preponderated in favor of an employment relationship.

A court's determination regarding the third factor—the worker's investment in equipment, material, or other workers—is less clear. In the exotic dancer cases, the dancers' "investments" were limited to house fees and "their own apparel, and, on occasion, food and decorations they brought to the club."[207] However, Uber drivers all have an obvious and substantial investment: a car. They probably also have insurance and similar investments.[208] While a car might today be considered too commonplace to constitute a separate "investment" for employment purposes, it is the central machinery of Uber's business model. Moreover, the court would probably compare the individual driver's investment with Uber's large capital investment in the business.[209] Given these relatively even arguments, the court would likely find it ambiguous as to whether this factor preponderated in favor of an employment relationship.

However, the court would probably find no ambiguity for the fourth factor—the degree of skill required for the work. Though the courts analyzing exotic dancers' worker status admitted that stripping required some base-line level of dancing skills and attractiveness, they unanimously found it unskilled labor.[210] Likewise, the court would probably find that the

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204. *See Community Guidelines*, UBER, https://www.uber.com/legal/community-guidelines/us-en/ (last visited Feb. 23, 2018); *see also Drive*, UBER, https://www.uber.com/drive/ (last visited Feb. 23, 2018).

205. *See Gardner*, 2015 WL 7783556, at *15 (citing McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 270 (4th Cir. 2016)).

206. *Id.*

207. *McFeeley*, 825 F.3d at 243.

208. Hall & Krueger, *supra* note 16, at 16–17.

209. *Cf. Gardner*, 2015 WL 7783556, at *15–16 (comparing the investments of the clubs versus the dancers).

210. *Id.* at *16; *see also McFeeley*, 825 F.3d at 243–44.

degree of skill required for basic driving competency does not suggest Uber drivers' independence. Thus, it would likely find that the fourth factor weighed in favor of an employment relationship.

Under South Carolina's interpretation of the six-factor FLSA test, the fifth factor—the permanence of the working relationship—may or may not suggest an employment relationship. This factor appears to be the most variable among the lot, as it turns on the individual worker's circumstances. The courts in the exotic dancer cases found that the duration of the dancers' employment only "for a matter of months" weighed against an employment relationship.[211] While certain Uber drivers may remain so for years, a large number do not last more than a year.[212] Though this factor would depend upon the individual driver's circumstances, it would more frequently than not weigh against an employment relationship.

The final factor—the integrality of the worker's services to the putative employer's business—would probably further suggest an employment relationship. In the exotic dancer cases, the courts simply found that "exotic dancers are integral to operations as a gentleman's club."[213] Analogously, Uber drivers are integral to Uber's operations as a technology company or as a transportation company. Thus, no matter Uber's metaphysical classification, the court would likely find that the sixth factor suggested an employment relationship.

Taken together, four out of the six factors would almost certainly suggest an employment relationship to a South Carolina court. The fifth factor—permanence—would depend upon the worker's individual circumstances. Only the third factor—investment—could conceivably weigh against an employment relationship generally. But because at least four of the six would suggest employment in every case, the court would deem virtually all Uber drivers in South Carolina employees of the company. Thus, whether in state or federal court, South Carolina jurisprudence would likely deem Uber drivers employees under both of the most commonly applied employment tests. Importantly, due to the inadequate analysis of South Carolina's current jurisprudence, the courts' decisions would probably not change depending upon the individual Uber driver's work circumstances.

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211. *See Gardner*, 2015 WL 7783556, at *16.
212. Hall & Krueger, *supra* note 16, at 16.
213. *Gardner*, 2015 WL 7783556, at *17.

B. South Carolina and Academic Models

As we have seen, a South Carolina court determining facts similar to *O'Connor v. Uber* would likely deem Uber drivers employees under both the six-factor FLSA test and the four-factor right to control test. This determination would probably not change based on the individual Uber driver's circumstances. Thus, South Carolina's current jurisprudence would likely apply a one-size-fits-all approach to Uber employment and likely to other platform employment as well.

This unrefined approach contradicts the most promising scholarly models of platform economy employment.[214] As noted above, recently proposed employment models of the platform economy differ widely in both aim and feasibility.[215] Generally speaking, three categories of approaches have emerged: (1) "modification" approaches; (2) "third category" approaches; and (3) "assumption-shifting" approaches.[216] However, South Carolina's conservative approach to jurisprudential reforms leaves any discussion of the second and third categories unproductive.[217] In all likelihood, South Carolina will not create whole cloth a third category of worker. Additionally, it will probably not create a default assumption of employee in all cases.

Rather, as detailed above, the most promising model for South Carolina articulated thus far is the Means-Seiner "worker flexibility" approach.[218] This approach is not only elegantly simple, but it allows for different determinations for different workers. Importantly, it emphatically avoids a one-size-fits-all approach. Thus, South Carolina's likely ruling in an Uber case is at odds with the most prudent scholarship on the topic.

Fortunately, however, South Carolina is in a unique position: it can anticipatorily correct its jurisprudence before issuing improper precedent. No South Carolina court has yet ruled on an Uber—or any platform economy employment—case. What's more, the Means-Seiner approach requires neither legislative intervention nor dramatic judicial action. In fact, the worker flexibility approach is already embedded in an examination of the "economic reality" of a working relationship. Thus, a South Carolina court is probably already obligated to consider worker flexibility because it "clarifies

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214. *See supra* Section II.B.

215. *See supra* Section II.B.

216. *See supra* Section II.B.

217. *See supra* Section II.B.

218. *See* Means & Seiner, *supra* note 28 (for a more detailed explanation of the "worker-flexibility" approach).

the economic independence of working relationships."[219] Thus, a South Carolina court could easily apply it in its first foray into platform employment. In doing so, South Carolina could bypass years of unhelpful and overgeneralizing decisions, all while maintaining its business-friendly image.[220]

V. CONCLUSION

South Carolina courts' previous employment determinations of exotic dancers shed helpful light on their likely responses to Uber and other platform economy employment disputes. Based on these decisions, a South Carolina court would likely indiscriminately deem Uber drivers and many other platform economy workers employees. Such a determination would be antithetical to South Carolina's coveted "business-friendly" environment and would contradict the most promising scholarly approaches to platform employment. Because no South Carolina court has yet faced a platform employment dispute, however, South Carolina is in a unique position to anticipatorily adopt the leading scholarly approaches to platform employment before establishing unhelpful precedent. Accordingly, South Carolina courts should do so when first handling an Uber or other platform employment issue by proceeding under the Means-Seiner "worker flexibility" approach. Unlike most other approaches, the Means-Seiner approach requires neither legislative intervention nor dramatic judicial activity. Therefore, South Carolina courts should recognize the inadequacies of their current employment jurisprudence to the platform economy, and they should anticipatorily adopt the Means-Seiner approach to such issues.

Axton D. Crolley

219. *Id.* at 1536.
220. *See supra* note 35 and accompanying text.

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